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No. 10-736

In the Supreme Court of the United States

ADHAM MOHAMMED ALI AWAD, PETITIONER

v.

BARACK H. OBAMA,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

EDWIN S KNEEDLER
Deputy Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
ROBERT M. LOEB
AUGUST E. FLENTJE
Attorneys
Department of Justice
Washington, D C 20530-0001
SupremeCtBriefs@usdoj gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether intelligence reports and other "hearsay" evidence commonly used by the military to justify the detention of individuals captured abroad during armed conflict is admissible in habeas corpus proceedings challenging the detention of foreign nationals at Guantanamo Bay, Cuba, when a court determines that such evidence is reliable when considered in context.

2. Whether a burden of proof higher than a preponderance of the evidence is constitutionally compelled in these unique habeas proceedings.

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OPINIONS BELOW

The unclassified version of the opinion of the court of appeals (Pet. App. 1-23) is reported at 608 F.3d 1. An unclassified version of the opinion of the district court (Pet. App. 24-38; App., *infra*, 1a-16a) is reported at 646 F. Supp. 2d 20.[1]

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2010. A petition for rehearing was denied on

[1] The version of the district court opinion published in the Federal Supplement and included in the appendix to the petition excludes material that was declassified after a review conducted during the appeal. The full unclassified version of the opinion is attached as an appendix to this brief

September 1, 2010 (Pet. App. 39). The petition for a writ of certiorari was filed on November 30, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is an alien detained at the United States Naval Station at Guantanamo Bay, Cuba, under the 2001 Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224. He petitioned for a writ of habeas corpus, and the district court denied the petition. The court of appeals affirmed. Pet. App. 1-23.

1. In response to the attacks of September 11, 2001, Congress enacted the AUMF, which authorizes "the President * * * to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." AUMF § 2(a), 115 Stat. 224. The President has ordered the Armed Forces to subdue both the al-Qaida terrorist network and the Taliban regime that harbored it in Afghanistan. Armed conflict with al-Qaida and the Taliban remains ongoing, and in connection with those conflicts, some persons captured by the United States and its coalition partners have been detained at Guantanamo Bay.

2. Petitioner, an alien detained at Guantanamo Bay under the AUMF, filed a petition for a writ of habeas corpus. His petition was filed before this Court held in *Boumediene* v. *Bush*, 553 U.S. 723 (2008), that district courts have jurisdiction to consider habeas petitions filed by Guantanamo detainees, and proceedings were stayed pending resolution of that jurisdictional issue. After *Boumediene*, the government filed a factual re-

turn to the habeas petition, and petitioner filed a traverse. Pet. App. 25.

3. Following a hearing, the district court denied the petition. App., *infra*, 1a-16a. As an initial matter, the court held that it would consider certain hearsay evidence introduced by the parties. The court explained that it had "formally 'received' all of the evidence offered by either side but [had] assessed it item-by-item for consistency, the conditions in which statements were made and documents found, the personal knowledge of a declarant, and the levels of hearsay," adding that it would "give[] the evidence the weight I think it deserves." *Id.* at 6a. The court declined to give a "presumption of reliability and credibility" to the government's evidence, reasoning that to do so would "go[] too far because it would seem to place the burden of rebuttal on the petitioner." *Ibid.*

The district court also held that "the government had the burden of proving the lawfulness of detention by a preponderance of the evidence." App., *infra*, 6a. The court emphasized that the "burden of proof never shifted" to petitioner under that standard, and that "[n]o inference was drawn from [petitioner's] decision not to testify or from his failure to sign or swear to" the statement he submitted to the court. *Ibid.*

The district court next looked in detail at the evidence tending to show that petitioner was part of al-Qaida. First, petitioner had told interrogators that he left his home country of Yemen and went to Afghanistan in September 2001 to train and to fight. App., *infra*, 7a-8a. The court reasoned that, given the timing and stated purpose of petitioner's travel, there was "support" for the conclusion that he "wished to join Al Qaida to fight against the U.S." *Id.* at 7a.

The district court then considered the government's allegation that petitioner had attended al-Qaida's Tarnak Farms training camp in Kandahar, Afghanistan. App., *infra*, 8a-10a. The government pointed out that the name "Abu Waqas" appeared on a list of names found at that camp, and the court agreed that petitioner had used that name. *Id.* at 8a-9a (noting that petitioner "denies any association with the name 'Abu Waqas,' but this denial is not credible"). The court also concluded that petitioner's "account of his whereabouts at the time the government believes he was at Tarnak Farms * * * may be implausible." *Id.* at 9a-10a. Nevertheless, without more evidence of "the purpose of the list or when it was written," the court found "the claim of Tarnak Farms training to be unsupported." *Ibid.*

Next, the district court examined the circumstances of petitioner's capture. App., *infra*, 10a-11a. It was "not seriously disputed" that "Al Qaida fighters entered and barricaded themselves inside the Mirwais Hospital" in Kandahar "at some time during the first week of December 2001; that U.S. and affiliated forces laid siege to the hospital"; and that petitioner was captured there on December 29, 2001. *Ibid.* Another member of the al-Qaida group in the hospital, a man named al Joudi, was captured before petitioner and "provided names and descriptions for the surviving eight members of the al Qaida group, including" petitioner, whom he identified as "Abu Waqqas" and whom he correctly described as having "had his right leg amputated." *Id.* at 11a. Four of the names al Joudi provided "were identical to or transliterations of names listed near 'Abu Waqas' on the Tarnak Farms document." *Ibid.* In addition, contemporaneous news reports provided corroborative information about the siege. *Id.* at 10a.

Finally, the district court examined classified documents, including one containing names; the court observed that "[f]ive of the[] names match names found on the list provided by Al Joudi, and three * * * match names found on the Tarnak Farms document." App., *infra*, 14a. In the court's view, the "correlation among the names on the al Joudi list, the Tarnak Farms list, [and classified documents] is too great to be mere coincidence." *Id.* at 15a. The court reasoned that petitioner's "confessed reasons for traveling to Afghanistan and the correlation of names on * * * the list * * * clearly tied to al Qaida make it more likely than not that he knew the al Qaida fighters at the hospital and joined them in the barricade." *Id.* at 16a. The court therefore concluded that "it appears more likely than not that [petitioner] was, for some period of time, 'part of' al Qaida." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1-23. As to the standard of proof, the court explained that "[w]e have already explicitly held that a preponderance of the evidence standard is constitutional in evaluating a habeas petition from a detainee held at Guantanamo." *Id.* at 20 (citing *Al-Bihani* v. *Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010), petition for cert. pending, No. 10-7814 (filed Nov. 29, 2010)). In addition, the court of appeals held that the district court could consider hearsay "if the hearsay is reliable." *Id.* at 12 (citing *Al-Bihani*, 590 F.3d at 879). Having rejected petitioner's procedural challenges, the court of appeals also rejected petitioner's challenges to the district court's factual findings, reasoning that whether its review was "*de novo* or for clear error does not matter in this case because the evidence is so strong." *Id.* at 19.

ARGUMENT

Petitioner argues (Pet. 10-33) that district courts should not consider hearsay evidence in evaluating habeas corpus petitions brought by individuals detained at Guantanamo Bay under the AUMF, and that, in responding to such petitions, the government should be required to prove by more than a preponderance of the evidence that detention is proper. Those challenges to the procedures employed in Guantanamo habeas cases are essentially identical to the challenges made in another case in which a petition for a writ of certiorari has been filed, *Al Odah* v. *United States*, No. 10-439 (filed Sept. 28, 2010). As in *Al Odah*, the court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court.

To date, the district courts have issued decisions in habeas cases involving 59 detainees, granting writs of habeas corpus for 38 detainees and denying writs for 21 detainees. The D.C. Circuit has now issued decisions in nine cases, affirming the denial of writs of habeas corpus in four cases including this one, see *Al Odah* v. *Obama*, 611 F.3d 8 (2010), petition for cert. pending, No. 10-439 (filed Sept. 28, 2010); *Barhoumi* v. *Obama*, 609 F.3d 416 (2010); *Al-Bihani* v. *Obama*, 590 F.3d 866 (2010), petition for cert. pending, No. 10-7814 (filed Nov. 29, 2010); reversing the grant of a writ in one case, see *Al-Adahi* v. *Obama*, 613 F.3d 1102 (2010), cert. denied, 131 S. Ct. 1001 (2011); vacating the grant of a writ and remanding for further proceedings in two cases, see *Hatim* v. *Gates*, No. 10-5048, 2011 WL 553273 (Feb. 15, 2011); *Salahi* v. *Obama*, 625 F.3d 745 (2010); and reversing the denial of a writ and remanding for further proceedings in two cases, see *Warafi* v. *Obama*, No. 10-5170, 2011

WL 678437 (Feb. 22, 2011); *Bensayah* v. *Obama*, 610 F.3d 718 (2010). No D.C. Circuit panel has held that the admission of hearsay evidence, subject to the district court's assessment of its reliability and probative value, is improper in this unique context. And no D.C. Circuit judge or district court judge has concluded that a standard of proof more rigorous than preponderance of the evidence should apply.

In short, the lower courts have properly performed the task that this Court assigned them in *Boumediene* v. *Bush*, 553 U.S. 723 (2008)—they have developed "procedural and substantive standards," *id.* at 796, for habeas proceedings for military detainees. Nothing in the Constitution or any other source of law requires the application of different standards or procedures. Further review is not warranted.

1. Petitioner contends that the court of appeals erred in relying upon intelligence reports and other "hearsay" evidence in assessing the lawfulness of his detention. Specifically, he argues (Pet. 20) that a series of D.C. Circuit decisions holding that hearsay evidence is admissible and instructing the district court judges to assess the reliability and probative value of such evidence, see Pet. App. 17; *Al Odah*, 611 F.3d at 14; *Al-Bihani*, 590 F.3d at 879, "directly conflicts with *Boumediene* and *Hamdi*." That argument lacks merit.

a. This Court has recognized that habeas proceedings for detainees held by the military are unique, and that the standards and evidentiary rules that would apply in a domestic criminal case are not necessarily applicable in this context. See *Boumediene*, 553 U.S. at 783 ("Habeas corpus proceedings need not resemble a criminal trial."); *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality opinion) (recognizing that the "full protections

that accompany challenges to detentions in other settings may prove unworkable and inappropriate" in habeas proceedings for military detainees). In proceedings challenging the military's detention of individuals captured abroad during an armed conflict, information generated by the military—and by other agencies operating abroad—will generally be not only the most relevant and probative evidence, but often the only evidence bearing on the legality of the detention. It is appropriate for courts to consider the same types of evidence that the military necessarily uses when it makes detention decisions. See *id.* at 531 (plurality opinion) (noting that the "law of war and the realities of combat may render [military] detentions both necessary and appropriate, and * * * our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them").

Indeed, the *Hamdi* plurality strongly suggested that intelligence reports should, as a general rule, be admissible in habeas proceedings for detainees held by the military. The plurality explicitly recognized that the government could support the detention of a United States citizen with "documentation regarding battlefield detainees already * * * kept in the ordinary course of military affairs," 542 U.S. at 534, such as the intelligence reports that form the core evidentiary basis for most of the Guantanamo habeas cases, see *id.* at 538 (approving of hearsay evidence contained in declaration of government official). Likewise, this Court recognized in *Boumediene* that habeas proceedings are flexible and may be adapted to circumstances as necessary, including the unique military setting at issue here. 553 U.S. at 779 (stressing that "common-law habeas corpus was, above

all, an adaptable remedy"). The Court therefore noted that "accommodations can be made" in this exceptional context "to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ." *Id.* at 795. And the Court cautioned that, in developing "procedural and substantive standards," the lower courts should accord "proper deference * * * to the political branches." *Id.* at 796.

Adhering to *Hamdi* and *Boumediene*, the district courts and the court of appeals have developed a set of procedural rules to govern the habeas proceedings for the detainees held by the military at Guantanamo. As this case illustrates, within the context of these unique proceedings, district court judges generally admit and consider intelligence reports and other "hearsay" evidence, and assess its reliability and probative value. App., *infra*, 5a-6a. In making those case-specific and highly contextual assessments, the district courts have not blindly accepted the government's proffers. See *e.g.*, *Al Rabiah* v. *United States*, 658 F. Supp. 2d 11, 28-40 (D.D.C. 2009). Unlike juries, district court judges understand the limitations of certain types of hearsay evidence and have experience in evaluating the reliability of such evidence. Cf. *Bourjaily* v. *United States*, 483 U.S. 171, 180 (1987) (holding that district courts may consider hearsay in assessing the admissibility of evidence); *Rugendorf* v. *United States*, 376 U.S. 528, 533 (1964) (court may consider hearsay in issuing a search warrant); *Crawford* v. *Jackson*, 323 F.3d 123, 128 (D.C. Cir. 2003) (hearsay may be considered in parole-revocation proceeding); *Espinoza* v. *INS*, 45 F.3d 308, 310 (9th Cir. 1995) (hearsay may be considered in immigration proceedings); 28 U.S.C. 2246 ("evidence may be

taken * * * by affidavit" in statutory habeas proceedings); 18 U.S.C. 3142 (2006 & Supp. III 2009) (hearsay admissible in pretrial detention hearings); 18 U.S.C. 3661 (hearsay admissible in sentencing hearings).

In performing that gatekeeping function, the district court judges have had the benefit of detailed declarations from the government concerning intelligence-gathering methods and techniques used to create different types of reports. See, *e.g.*, C.A. App. 669-702. And in this case, the district court specifically declined to give the evidence any "presumption of reliability [or] credibility," App., *infra*, 6a, and it carefully addressed each piece of hearsay evidence in the record in reaching its conclusion.

Significantly, in many cases, much of the "hearsay" evidence supporting detention consists simply of military or other reports recording what the detainee has said. For example, in this case, key evidence included statements by petitioner himself that he traveled to Afghanistan in September 2001 for the purpose of training and fighting. App., *infra*, 7a-8a. Leaving aside the threshold point that records of a party's own statements do not constitute "hearsay," see Fed. R. Evid. 801(d)(2)(A), there are fewer legitimate bases for questioning the reliability of such routine records than for questioning some more attenuated intelligence reports, see *Parhat* v. *Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008) (stressing that hearsay evidence "must be presented in a form, or with sufficient additional information, that permits the Tribunal and court to assess its reliability"). In such circumstances, a detainee can challenge the reliability of reports purporting to summarize what he has previously admitted simply by testifying at the habeas

hearing—a right open to all detainees in these proceedings.

The district court also did not err in admitting and relying on other intelligence reports in this case. Those reports explained that their source was the translated documents found at various locations tied to al-Qaida, such as the Tarnak Farms document, which was found at Tarnak Farms, an al-Qaida training facility. See, *e.g.*, C.A. App. 595. In addition, in concluding that the intelligence documents had sufficient indicia of reliability to help show that petitioner was part of the group of al-Qaida fighters barricaded in the hospital, the district court carefully reviewed the documents, comparing them with each other, with al Joudi's statements, with petitioner's own statements, and with contemporaneous news accounts. App., *infra*, 14a; see Pet. App. 7, 13-19. Thus, as this case illustrates, the approach to hearsay endorsed by the court of appeals and applied by the district courts is correct and is fully consistent with both *Hamdi* and *Boumediene*.

b. The district courts have fashioned habeas procedures for Guantanamo detainees that furnish safeguards concerning the use of hearsay evidence by allowing the detainees' counsel access to the evidence and an opportunity to contest the reliability of particular pieces of evidence. See *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 168 (1988) (upholding the admission of evidence "subject to the ultimate safeguard—the opponent's right to present evidence tending to contradict or diminish [its] weight"). The district courts have generally allowed intelligence reports and expert declarations to be introduced (by both parties), while the detainee and his counsel have had substantial opportunities to challenge the government's assertions and to question the evi-

dence. See Case Management Order, *Awad* v. *Obama*, No. 05-cv-2369, Docket entry No. 95 (D.D.C. Nov. 7, 2008); Order, No. 05-cv-2369, Docket entry No. 110 (D.D.C. Dec. 16, 2008) (amending Case Management Order). In this and other cases, for example, the government has filed a factual return and complied with its obligations to disclose "exculpatory evidence"—that is, evidence that would tend to show that the detention standard is not met—and petitioner has had the opportunity to make additional requests for specific discovery. See Case Management Order; App., *infra*, 2a. Petitioner's attorneys were granted security clearances and given access to the classified evidence, and petitioner responded to the government's factual return with a traverse. *Ibid.* Petitioner's counsel had an opportunity to raise questions regarding the government's intelligence documents, and petitioner had an opportunity (which he declined) to testify at a hearing in order to challenge the accuracy and reliability of any documents summarizing any of his prior statements, as well as to provide an explanation for his presence with the al-Qaida fighters in the hospital. See Pet. 8. Indeed, petitioner's claim that it was improper for the district court to rely on hearsay is substantially undermined by his reliance on an unsworn declaration, rather than his own testimony, to tell his story and support his challenge to the government's evidence. App., *infra*, 3a-4a; C.A. App. 300-304.

Petitioner's only specific challenges to the district court's reliance on hearsay concern al Joudi's statement (Pet. 32), and the Tarnak Farms list (Pet. 17-18). But the district court relied on those pieces of evidence only to the extent that they were corroborated by other evidence in the record: the names on the list matched up

against the names identified by al Joudi as belonging to members of the al-Qaida group barricaded in the hospital, as well as with the names on two other classified documents tied to al-Qaida. App., *infra*, 14a. That evidence also squared with petitioner's multiple statements that he went to Afghanistan in September 2001 to train and fight, *id.* at 7a-8a, his admission that he was "surrendered by the insurgents" (Pet. 7), as well as multiple contemporaneous news accounts putting petitioner with the al-Qaida group behind the barricade in the Mirwais hospital, App., *infra*, 10a n.4.

As the court of appeals explained, the "district court took the Tarnak Farms Document, considered the circumstances of the document, and weighed it accordingly in its analyses of the various questions," and it "was not error for the district court to find the document relevant on some issues, but not others." Pet. App. 13. Similarly, the "listing of identical names in the [redacted] and in al Joudi's list indicates that al Joudi's statements identifying the other al Qaeda fighters were reliable." *Id.* at 15. The lower courts did not err in weighing all of the evidence together to determine that petitioner was part of the group of armed al-Qaida members who barricaded themselves in the Mirwais hospital. See *Bourjaily*, 483 U.S. at 179-180 ("[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it," because the "sum of an evidentiary presentation may well be greater than its constituent parts").

2. Petitioner also argues (Pet. 18-19) that application of a preponderance standard is inappropriate and that a higher standard should apply in this context. That is incorrect.

a. Habeas proceedings involving military detainees are unique and require a flexible approach tailored to

their specific circumstances. While the Court in *Boumediene* held in general terms that courts considering Guantanamo habeas petitions "must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain," 553 U.S. at 783, it did not specifically address what substantive or procedural standards would be appropriate. See *id.* at 796-797. Instead, the Court directed the district courts to craft appropriate standards, stating that "[t]he extent of the showing required of the Government in these cases is a matter to be determined." *Id.* at 787.

Implementing that directive from this Court, the district courts have reached a consensus that the government should bear the burden of showing, by a preponderance of the evidence, that detention is lawful. See Case Management Order.[2] And while the court of appeals has suggested that a lower standard of proof might be constitutional, see *Al-Adahi*, 613 F.3d at 1104-1105; *Al-Bihani*, 590 F.3d at 878 & n.4, it has held that the preponderance of the evidence standard adopted and applied by all of the district courts satisfies the Constitution. See, *e.g.*, Pet. App. 19-21; *Al Odah*, 611 F.3d at 13. None of petitioner's arguments demonstrate that the lower courts erred in applying that standard in evaluating his habeas petition.

b. As this Court has explained, "[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, is merely a question of policy and fairness based on experi-

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[2] When the district court issued its Case Management Order in November 2008 adopting a preponderance standard, the government successfully challenged certain provisions of that order, but did not challenge its adoption of a preponderance standard and determined instead to meet that standard.

ence in the different situations." *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 209 (1973) (internal quotation marks omitted). In *Boumediene*, this Court noted that "[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing." 553 U.S. at 783. For that reason, in the unique circumstances of the proceedings here, it is appropriate for the government to bear the burden of proof by a preponderance of the evidence, and not to apply the general habeas rule that a petitioner bears the burden to demonstrate his entitlement to the writ. See *Garlotte* v. *Fordice*, 515 U.S. 39, 46 (1995) ("[T]he habeas petitioner generally bears the burden of proof."). The early cases confirm that in cases of Executive detention "the ultimate burden of satisfying the judge" generally rested "with the respondent." R.J. Sharpe, *The Law of Habeas Corpus* 87-88 (1976). The preponderance standard adopted by the district court and upheld by the court of appeals is consistent with that approach because it requires the government to bear the ultimate burden of proof.

In accord with *Boumediene* and that historical background, where (as here) the Executive has not come forward with a prior administrative or judicial adjudication of the matter that might support a more deferential review, the presumptive baseline for civil proceedings—that the party with the burden of persuasion must establish its case by a preponderance of the evidence—should apply. While a higher standard of proof attaches at a criminal trial, it would be inappropriate to apply that standard to this non-punitive, law-of-war detention. This unique setting provides an exception to the general presumption against executive detention, see *United States* v. *Salerno*, 481 U.S. 739, 748 (1987) (exception for

detention arising as part of "the exigencies of war"), and "the law of war and the realities of combat may render [military] detentions both necessary and appropriate," *Hamdi*, 542 U.S. at 531 (plurality opinion).

Notably, the Army Regulation that establishes procedures for determining the proper status of certain military detainees in accordance with the laws of war and the Geneva Convention employs a preponderance of the evidence standard. See, *e.g.*, Army Regulation 190-8, ch. 1, § 1-6(e)(9) (1997) (inquiry into prisoner of war status). There is no basis for applying a higher standard here when adjudicating the lawfulness of the Executive's authority to detain an individual under the AUMF, as informed by the laws of war.

Moreover, as the district courts have unanimously held, the preponderance standard appropriately reflects the competing interests at stake in these habeas proceedings as they currently are conducted in the district court. Like any military detainee subject to detention under the laws of war, the individuals captured during the ongoing armed conflict and held at Guantanamo have an obvious interest in their own liberty. On the other side of the balance, there are "weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." *Hamdi*, 542 U.S. at 531 (plurality opinion). The preponderance standard provides the traditional procedural framework that appropriately balances those interests.

c. Although petitioner insists (Pet. 19) that a more stringent clear-and-convincing-evidence standard should apply, the lower courts' application of a preponderance standard allows for the "meaningful review" this Court envisioned in *Boumediene*, 553 U.S. at 783. Application

of a higher standard has no historical support, would be inconsistent with military practices for adjudicating prisoner-of-war status, and would ignore the practical difficulties in obtaining and producing relevant evidence in these military detention cases. See, *e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2092 (2007) (concluding that "detention on [the basis of a preponderance standard] seems to us to be acceptable in view of the difficulties of collecting and preserving evidence in battlefield conditions"). A higher standard is not necessary for "meaningful review" and would create an inappropriate risk of harm to the government and the public at large, given that wrongfully released fighters could rejoin the battle against United States troops and interests. See *Salerno*, 481 U.S. 748-749 (emphasizing that "society's interest" in detention is "at its peak" "in times of war or insurrection").[3]

d. Finally, petitioner contends (Pet. 16) that courts should apply a sliding-scale procedural regime "depending on the circumstances of the case" and the "facts relating to capture." He suggests (Pet. 27) a higher stan-

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[3] Although it is appropriate for the government to bear the burden of proof by a preponderance of the evidence in these unique circumstances in which the government is not presenting and defending an administrative adjudication, the same approach may not apply in other contexts of review of military detention. See generally *Boumediene*, 553 U.S. at 786 (noting that "habeas corpus review may be more circumscribed if the underlying detention proceedings are more thorough than they were here"). For example, a formal military adjudication regarding the detainee's status could warrant substantial judicial deference. A less formal military decision might likewise warrant some degree of judicial deference. See, *e.g.*, *Hamdi*, 542 U.S. at 534 (plurality opinion); see also *Hirota* v. *MacArthur*, 338 U.S. 197, 215 (1949).

dard in cases where a person is not "engaged in armed conflict" when captured. Petitioner forfeited that argument by failing to advance it below, and, in any event, it lacks merit.

Petitioner's proposed sliding-scale burden of proof, which has not been accepted by any district court, would require collateral litigation aimed at making a "threshold demonstration by credible evidence that the individual was captured while engaged in armed conflict." Pet. 27. In other words, it would entail duplicative preliminary litigation on the dispositive issue in many of the Guantanamo habeas cases. In this case, for example, petitioner admits that he was with a group of armed al-Qaida fighters who were besieged in the Mirwais hospital and fighting United States forces. Pet. 7. A capture in that context would seem to qualify as a capture during "armed conflict" under any reasonable view of that standard. And the evidence that petitioner went to Afghanistan to fight and then was found with that group of fighters in the hospital, in conjunction with the corroborated statement by al Joudi that petitioner was part of the group, is "credible evidence" that petitioner was himself "engaged in [that] armed conflict." Pet. 27. Indeed, that is ultimately the finding that sustained petitioner's detention in the district court and on appeal. App., *infra*, 16a (finding that it was "more likely than not that [petitioner] knew the al Qaida fighters at the hospital and joined them in the barricade"); Pet. App. 23 (petitioner "succeeded in that goal [of joining the fight] by joining a group of al Qaeda fighters who took over part of a hospital and barricaded themselves therein"). Accordingly, even under petitioner's rule, there would be no basis for the courts below to apply a higher standard than preponderance of the evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

EDWIN S. KNEEDLER*
Deputy Solicitor General
TONY WEST
Assistant Attorney General
ROBERT M. LOEB
AUGUST E. FLENTJE
Attorneys

MARCH 2011

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* The Acting Solicitor General is recused in this case.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 05-CV-2379

ADHAM MOHAMMED ALI AWAD, PETITIONER

v.

BARACK H. OBAMA, ET AL., RESPONDENTS

[Filed: Aug. 12, 2009]

MEMORANUM ORDER DENYING WRIT OF HABEAS CORPUS

Adham Mohammed Al Awad, a citizen of Yemen, alleges that he is illegally detained at Guantanamo Bay Naval Base and petitions this Court for a writ of *habeas corpus* to secure his release. The parties have cross-moved for judgment on the record. The government's motion will be granted.

I. Background

Awad has been in U.S. custody since his capture in Afghanistan on December 29, 2001. He filed his petition four years ago, but that petition and hundreds like it were put on hold until various legal issues, including the jurisdiction of this Court, were resolved. After the Su-

preme Court held that detainees like Awad have a right to bring *habeas* petitions and that federal district courts have jurisdiction to hear them, *Boumediene v. Bush*, 553 U.S. —, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008), and after Judge Hogan issued his omnibus Case Management Order that has guided the Guantanamo habeas cases' procedures, this case moved on to the merits.

The government filed a factual return asserting the grounds on which Awad is detained—the claim is that he is an al Qaida fighter—and the evidence supporting that claim. Awad then made several requests for discovery. I denied some of those requests outright and denied others without prejudice to their later renewal with the kind of specificity required of motions under Fed. R. Civ. P. 56(f). Awad submitted his traverse without renewing his discovery requests. Both sides then moved for judgment on the record and a hearing on those cross-motions was held on July 31, 2008.

The government's core narrative is that Awad volunteered or was recruited for Jihad soon after September 11, 2001 and traveled from his home in Yemen to Afghanistan; that he trained at the Al Qaida "Tarnak Farms" camp outside Kandahar; that Awad and a group of other Al Qaida fighters were injured in a U.S. air strike at or near the airport in Kandahar and went to Mirwais Hospital for treatment; that these men then barricaded themselves in a section of the hospital; that U.S. and associated forces laid siege to the hospital; that Awad's comrades gave him up because they could not care for his severely injured leg, which had required amputation; and that, after Awad's capture, his al Qaida comrades fought to the death.

The government offers five groups of evidence in support of their narrative: (1) Intelligence reports of Awad's statements to interrogators; (2) statements of a former Guantanamo detainee named Al Joudi who was inside Mirwais Hospital during the siege and who gave a list of names and descriptions of the Al Qaida fighters, including a man with an amputated right leg who went by the name Abu Waqas—a *kunya* allegedly associated with Awad;[1] (3) [**REDACTED**] (4) a list found at Tarnak Farms bearing the name "Abu Waqas" and several of the names that also appear [**REDACTED**] on al Joudi's list of names; and (5) newspaper articles published in American newspapers about the siege at Mirwais Hospital.

Petitioner's story is that he traveled to Afghanistan in mid-September 2001 in order to visit another Muslim country for a few months, intending to return home after his visit; that in early November 2001 he was injured and knocked unconscious during an air raid while walking through a market in Kandahar; that he woke up in Mirwas Hospital after part of his leg had been amputated; that he was heavily medicated, floated in and out of consciousness, slept constantly, and could barely sit up; and that he remained in this condition until his capture.

Awad's case relies mostly on weaknesses and holes in the government's evidence, but, in support of his narra-

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[1] A *kunya* is a sort of traditional, honorific nickname [**REDACTED**] Decl. at 2. A man's *kunya* will often be the word "abu"—literally translated to mean father and then the name of his first born child. *Id.* According to [**REDACTED**], Al Qaida members also use *kunyas* as honorific pseudonyms. *Id.* These *kunyas* are not dependent on whether an individual is a father and are sometimes used to conceal a true identity.

tive, he submits an unsigned affidavit, a declaration from his counsel, and different intelligence reports of different statements made to interrogators.

II. Legal Standards

> The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Authorization of Military Force, Pub. L. 107-04, 115 Stat. 224 (2001).

A. Substantial Support

The government's position is that:

> [t]he President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who *were part of*, or substantially supported, Taliban or *al-Qaida forces* or associated forces that are *engaged in hostilities against the United States or its coalition partners*, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

Respondent's Revised Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at p. 3 (emphasis added) .

In a thoughtful decision that has been followed by many if not most of the judges of this court, *Hamily v. Obama*, 2009 WL 1393113 (D.D.C. 2009), Judge Bates wrote that the "key inquiry" when analyzing the "part of . . . al Qaeda" test is "whether the individual functions or participates within or under the command structure of the organization—*i.e.* whether he receives and executes orders or directions." *Hamily*, 2009 WL 1393113 at * 8 (internal citations omitted). I have adopted Judge Bates' approach.

B. Hearsay, Authenticity, Chain of Custody

The government's case relies on "raw" intelligence data, multiple levels of hearsay, and documents whose authenticity cannot be proven (and whose provenance is not known and perhaps not knowable). Awad argues that such evidence should excluded because the government has not made individualized showings that "the hearsay evidence is reliable and that the provision of nonhearsay evidence would unduly burden the movant or interfere with the government's efforts to protect national security." CMO II (A). The government responds generally (not with individualized showings) that its intelligence documents are reliable because they were created during the intelligence gathering process and explains generally why the presentation of non-hearsay evidence would be a burden. The government urges that documents and reports generated for intelligence purposes should be accorded a presumption of reliability and credibility.

The suggestion of a presumption of reliability and credibility goes too far because it would seem to place the burden of rebuttal on the petitioner. I have instead formally "received" all the evidence offered by either side but have assessed it item-by-item for consistency, the conditions in which statements were made and documents found, the personal knowledge of a declarant, and the levels of hearsay. In other words, I have given the evidence the weight I think it deserves.

C. Burden of Proof

The government had the burden of proving the lawfulness of detention by a preponderance of the evidence. CMO II (A); *accord, Al Bihani v. Obama*, 594 F. Supp. 2d 35 (D.D.C. 2009); *Ali Ahmed v. Obama*, 613 F. Supp. 2d 51 (D.D.C. 2009). The burden of proof never shifted to Awad. No inference was drawn from Awad's decision not to testify or from his failure to sign or swear to his affidavit.

D. Detention for the Continuation of Hostilities

I acknowledge the power of Judge Huvelle's argument in **[REDACTED]** v. *Obama*, **[REDACTED]** that "the AUMF does not authorize the detention of individuals beyond that which is necessary to prevent those individuals from rejoining battle," but I decline to follow it in this case and have not considered whether or to what extent the continued detention of Awad supports the AUMF's self-stated purpose of "prevent [ing] . . . future acts of international terrorism," Pub. L. 107-04, 115 Stat. 224. Awad is a marginally literate amputee who has spent more than seven of his twenty six years—since he was a teenager—in American custody. It seems

ludicrous to believe that he poses a security threat now, but that is not for me to decide. Combat operations in Afghanistan continue to this day and—in my view—the President's "authority to detain for the duration of the relevant conflict" which is "based on longstanding law-of-war principles" has yet to "unravel." *See, Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) .

III. The Evidence

A. "Then Why He Here"

The record does not establish the date of Awad's entry into Afghanistan, but the parties agree that it was sometime in September 2001. *See*, ISN 88 Knowledgeability Brief (February 6, 2002). The government's suggested inference, that Awad wished to join Al Qaida to fight against the U.S. after the September 11 attack on the World Trade Center, finds support, although unclear support, in what Awad told several investigators: that he had met a man named Suraga at a mosque in al-Burayqa, Yemen, and that Suraga suggested to Awad that he go to Afghanistan to receive "training,"[2] ISN 088

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[2] In his affidavit, Awad claims that any incriminating statements he made were made "as a result of torture, the threat of torture or coercion and are therefore unreliable." Awad Aff. ¶ 5; Jones Aff. ¶ 7. The only specific allegation of coercion is the claim that interrogators threatened to withhold medical treatment until Awad provided them information. The government retorts that interrogators' notes reveal that Awad was provided care and that he used his medical condition as an excuse to avoid answering difficult questions. Even if such threats were made, *see*, ISN 88 MFR (August 4, 2003) ("Detainee . . claimed that one interrogator told him that if he did not cooperate that he would not receive care for his leg . . This is highly unlikely. . . . "), petitioner has failed to adequately connect these threats to any of his inculpatory statements.

MFR (March 21, 2002); cf., ISN 88 SIR (July 8, 2008); ISN 88 Handnote (Dec. 29, 2001); and that Awad traveled to Afghanistan to train with weapons or to become a fighter, ISN 088 SIR (July 23, 2005) (Went to Afghanistan to visit an Islamic nation and to receive weapons training); ISN 088 Knowledgeability Brief (Feb. 6, 2002) ("[W]ent to Afghanistan to become a fighter but never became one."); ISN 88 SIR (July 8, 2008).

Awad argues that the evidence shows that he entered Afghanistan around mid-September, and that it is unlikely he could have met Suraga, arranged his trip, and traveled to Afghanistan in only a few days or weeks after September 11th. *Id.* ("Source arrived in Afghanistan in mid-September ."). But the most natural answer to the theoretical question an interrogator scribbled on his notes of the first interview of Awad—"then why he here"—is the one suggested by the government's argument.

B. Training

The name "Abu Waqas" appears twice (once crossed out) on a list of names found in a one hundred page document retrieved from Al-Qaida's "Tarnak Farms" training camp in Kandahar sometime after that facility was taken by U.S. and associated forces.[3] IIR 7 739 3338 02. An intelligence report states that the document also contains notes on small arms and sniper training instruction, and aiming and distance calculations. AFGP-2002-00319.

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[3] There is no dispute that Tarnak Farms was an Al Qaida camp that provided advanced training. *See, generally,* [REDACTED] Decl.

Awad denies any association with the name "Abu Waqas," but this denial is not credible. He has identified himself on at least one occasion as "Waqqas Adham Mohammed Ali Ala-Awad." ISN 88 FD-302 (May 4, 2002). The name Waqas was attributed to Awad by the author of a "handnote" from an interview taken just after Awad's capture. ISN 088 Handnote (December 29, 2001). At the merits hearing petitioner's counsel finetuned the argument to an assertion that Awad never used the honorific "Abu" before "Waqas." That position is inconsistent with the other evidence. "Abu" appears before 53 of the 59 names on the Tarnak Farms list. IIR 7 739 3338 02; **[REDACTED]** Decl. at 2.

Except for the appearance of what seems to be his name on a list, however, the evidence that Awad received training at Tarnak Farms is nonexistent. We do not know the purpose of the list or when it was written. Even the translator claimed only that it was possibly" a list of trainees. IIR 7 739 3338 02. Awad himself has consistently denied that he ever attended an Al Qaida or Taliban training camp. Awad Aff. ¶¶3-6; ISN 88 Handnote (Dec. 29, 2001) ("EXPERIENCE learned how to use a Kalashnikov in Yemen"); ISN 88 SIR (July 8, 2008) (" . . . never received any training.").

This is Awad's account of his whereabouts at the time the government believes he was at Tarnak Farms:

> Accompanied by a friend named Suraga . . . [he] took a bus to Quetta Pakisatan and stayed in a Taliban controlled student hostel for five days. They then took a taxi . . . to Kandahar Afghanistan. They stayed two or three days in another Taliban student hostel until they found a house to rent. They stayed in the house for a month and a half to two

> months. The purpose of detainee's trip was to relax, gain weapons training, and join the fight in Afghanistan, but they never received any training.

ISN 88 SIR (July 8, 2008). That account may be implausible, but, in the absence of better evidence on the government's side, I find the claim of Tarnak Farms training to be unsupported.

c. Mirwais Hospital

The government relies mostly on newspaper articles to provide background information on the barricade and siege at Mirwais Hospital.[4] Awad has not asked that I disregard those articles, conceding that "they are informative on certain points." Tr 55:1-8. I will accordingly consider the articles sufficiently reliable on points that are not seriously disputed: that Al Qaida fighters entered and barricaded themselves inside the Mirwais Hospital at some time during the first week of December 2001; that U.S. and affiliated forces laid siege to the hospital; and that the siege ended in late January 2002 when U.S. associated forces confronted and killed the remaining members of the Al Qaida group. I will also turn to these articles to fill in evidentiary gaps when there is corroboration.

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[4] Karl Vick, *Hospital Detention of Arab Fighter Ends With Suicide*, Wash. Post, Jan 8, 2002, at A12; Drew Brown, *Al-Qauda Group Holed up in Hospital*, Phil. Inq , Dec. 30, 2001, at A10; Pamela Constable, *Kandahar Hospital Seige Ends in al Qaeda Deaths*, Wash. Post, Jan 28, 2002, at A12; Thomas E. Ricks & Karl Vicks, *U S Reports Calm in Afghanistan on Christmas Eve, At Kandahar Hospital, Arrest Brings Gunfire*, Wash Post, Dec. 25, 2001, at A21, *Drew Brown, Armed Patients, Not the Sick, Biggest Concern at Hospital*, Miami Herald, Dec. 26, 2001, at 21A.

Awad concedes that he was captured In the Mirwais Hospital on December 29, 2001. Tr 53:21-25. The government's primary evidence of Awad's involvement that he participated in the siege is statements by Majeed Abdulla al Joudi, a former Guantanamo detainee who claimed to have been inside the hospital and to have spoken with the al Qaida fighters. ISN [**REDACTED**] FD-302 (June 6, 2002); IIR 2 340 6056. [**REDACTED**], who was captured on December 25, 2001 (and who denies that he was part of al Qaida), told interrogators that he was in Afghanistan working with the charity Al Wafa; that one day he was hit by a car; that he woke up in Mirwais Hospital in the same room as the Al Qaida fighters; and that they struck up a conversation. ISN [**REDACTED**] FD-302 (June 6, 2002). They told him that they were involved in a car wreck[5] while fleeing a U.S. airstrike and talked about their weapons, although al Joudi never saw any. IIR 2 340 6056 02. Al Joudi also provided names and descriptions for the surviving eight members of the al Qaida group, including an "Abu Waqqas" from Yemen who had had his right leg amputated. *Id.* Four of the other names that al Joudi provided were identical to or transliterations of names listed near "Abu Waqas" on the Tarnak Farms document. *Compare,* IIR 2 340 6056 02, *with,* IIR 7 739 3338 02.

Awad was shown a picture of [**REDACTED**] but denied ever knowing him. ISN 88 FD-302 (October 15, 2002). He says that he did not arrive at the hospital with those al Qaida fighters and that he was injured in a market in Kandahar during a bombing raid. ISN 88 SIR (July 8, 208)(sic); Awad Aff. ¶8; ISN 88 SIR (July 8, 2008) ("When the [U.S.] airstrikes began in the city of

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[5] Apparently there are man bad drivers in Afghanistan.

Kandahar [Awad was separated from Sugara] and he never saw him again. [Awad] was pulling someone from the rubble of a bomb destroyed building when he was injured. . . . He woke up in a hospital. . . . "). Awad asserts that after his leg was amputated he was "located near elderly patients and children" and that while at the hospital he was "semi-conscious and in continuous pain—[and was] on pain medication throughout [his] time in the hospital that made [him] sleep." Awad Aff. ¶14. He "denied being with the other Arabs . . . and offered that he was on the first floor of the hospital . . . [but] was later moved to the second floor . . . where there were other Arabs whom he did not know." ISN 88 FD-302 (October 15, 2002); Awad Aff. ¶¶ 12-13. Awad states that he was "unarmed when he was taken by Afghan security forces from the hospital," Awad Aff. ¶16; ISN 88 **[REDACTED]**[6] ("No weapons or documents were found on" Awad when he was arrested), an assertion that is uncontested.

The only first-hand evidence offered by the government about Awad's capture was the report of a March 2006 interview with a Commander Momuck who claimed that he led the group that had taken Awad into custody. Momuck FM40 (March 15, 2006). That report is internally inconsistent, completely unreliable, and is given no weight.

The government's time line for Mirwais is flawed, too. Three intelligence reports state that Awad was either injured or "captured" on or before November 2, 2001. ISN 88 Baseball Card ("Circumstances of Capture: DOC: 2 Nov 2001 near Kandahar. He was injured on 20

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[6] **[REDACTED]** Tr. 32: 21-23

Oct 01 and hospitalized locally until arrest by the AMF."); ISN Knowlegability Brief (February 6, 2002) ("Source . . . was captured [11/02/2001] when he was injured near the airport in Qandahar."); ISN 88 MFR (March 21, 2002).

The November 2 date, if true, would mean that Awad did not enter the hospital with the Al Qaida fighters who participated in the barricade. The government suggests that the November 2, 2001 date in ISN 088 Knowlegability Brief (February 6, 2002) was a typographical error and that Awad's injury more likely occurred on December 2, 2001, the approximate date that the Al Qaida fighters barricaded Mirwais Hospital. Although there is some evidence to support this theory, *see,* ISN 88 Handote [sic] (December 29, 2001) (stating that the date of "capture" was "3 weeks ago,"),[7] I will not credit this convenient explanation. It does not explain why the Baseball Card states that Awad was injured on October 20, 2001. Nor does it explain why a different typo in the Knowledgeability Brief was later corrected, while the November date was left unchanged. *Compare,* ISN 088 Knowledgeability Brief (February 6, 2002), *with,* ISN 088 MFR (March 21, 2002); *see,* Res. MJR at 26.[8]

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[7] The parties are in general agreement that "capture" in this document should be read as "injury." Tr. 52:2-54:9; Res Opp. 26-28.

[8] The Baseball Card has some obvious inaccuracies such as that Awad "is married and has two children." ISN 88 Baseball Card Although this undermines the credibility of any information from that document, the government was unable to find the underlying document from which the November 1, 2001, date was taken. Tr 33:19-23. Because the November date is favorable to Awad and it is not refuted with equally strong evidence, I will assume it to be accurate.

D. [REDACTED]

Up to this point, we have (a) a reasonable inference that Awad went to Kandahar to fight, (b) no reliable evidence that he was actually trained there, (c) undisputed evidence that he was in Mirwais Hospital during part of the siege, and (d) inconsistent evidence about how and when he arrived there. [REDACTED] Five of their names match names found on the list provided by Al Joudi, and three of them match names found on the Tarnak Farms document. [REDACTED] IIR 7 739 3338 02, *and* IIR 2 340 6056 02.

[REDACTED] That remark finds corroboration in a newspaper account of a fighter who was killed trying to escape the siege at Mirwais *after* the date that Awad was captured. Karl Vick, *Hospital Detention of Arab Fighter Ends With Suicide*, Wash. Post, Jan 8, 2002, at A12.

[REDACTED] [9]

[REDACTED] [10]

Awad denies that [REDACTED]. He denies having met al-Dhali or al-Fadhl. Awad Aff. ¶7. He argues that,

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[9] The government relies on an identification of al-Dhali by another detainee given during an interrogation taken at Bargram, Afghanistan. ISN 1453 FM40 (June 14, 2004).

[10] [REDACTED] the Guantanamo detainee told interrogators that he guarded the Kandahar Airport from after September 11, 2001, until mid-November 2001. ISN [REDACTED] FD-302 (November 1, 2002). Although Awad argues out that this would have prevented [REDACTED] from training at Tarnak Farms when Awad would have been there, that is not necessarily true. [REDACTED] said that he had trained at the Al Faruq camp, and it is logical that an Al Qaida guard would receive advanced training.

because the siege at Mirwais Hospital was a well-publicized event, al-Dhaii would have known that Awad was captured, and would not have guessed that he was hiding. Awad also points out [REDACTED].

The following table demonstrates the importance [REDACTED]. The correlation among the names on the al Joudi list, the Tarnak Farms list, [REDACTED] is too great to be mere coincidence. The [REDACTED] I believe, the points that tip the scale finally in the government's favor.

Al Joudi List	[REDACTED]	Tarnak Farms List	[REDACTED]
Abu Dujana	[REDACTED]	[REDACTED]	[REDACTED]
Abu Amar	[REDACTED]	[REDACTED]	[REDACTED]
Abu Thuwabb	[REDACTED]	[REDACTED]	[REDACTED]
Abu Wakaas with an amputated right leg	[REDACTED]	Abu Waqas	[REDACTED]
Abu Saheeb	[REDACTED]	[REDACTED]	[REDACTED]
Abu Bakr	[REDACTED]	[REDACTED]	[REDACTED]

Abu Habeeb	[RE-DACTED]	[RE-DACTED]	[RE-DACTED]
Abu Hamman	[RE-DACTED]	[RE-DACTED]	[RE-DACTED]

IV. Conclusion

The case against Awad is gossamer thin. The evidence is of a kind fit only for these unique proceedings [**REDACTED**] and has very little weight. In the end, however, it appears more likely than not that Awad was, for some period of time, "part of" al Qaida. At the very least Awad's confessed reasons for traveling to Afghanistan and the correlation of names on a the list [**REDACTED**] clearly tied to al Qaida make it more likely than not that he knew the al Qaida fighters at the hospital and joined them in the barricade.

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The petition for writ of habeas corpus is denied.

/s/ JAMES ROBERTSON
JAMES ROBERSTON
United States District Judge